No. 84-542 (2)

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In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT T. SPURLOCK, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner contends that he is entitled to a new trial on the basis of an affidavit not filed in the district court and submitted to the court of appeals for the first time in his petition for rehearing.

1. Following a jury trial in the United States District Court for the Southern District of Alabama, petitioner was convicted of conspiracy to misapply bank funds, in violation of 18 U.S.C. 371, 656, and sentenced to three years' probation. The court of appeals affirmed (Pet. App. 1a-26a; 730 F.2d 692).

a. The evidence at trial, the sufficiency of which is not in dispute, is set out in the opinion of the court of appeals (Pet. App. 2a-3a, 20a). In brief, petitioner's co-defendants

E.A. Gregory and Vonna Joe Gregory[1] engaged in various forms of self-dealing at the expense of a bank in which they had a controlling interest. Petitioner was a vice-president and member of the board of directors of the bank. In furtherance of the conspiracy, he approved a $150,000 loan from the bank to his father-in-law. The proceeds of this loan provided benefits to the Gregorys. *Ibid.*

b. The jury returned its guilty verdict on April 5, 1982. Petitioner filed a motion for judgment of acquittal or in the alternative for a new trial on April 26, 1982, outside the seven-day period following the verdict in which such motions normally must be filed absent an extension of time.[2] The motion complained of the sufficiency of the evidence, various evidentiary rulings, the denial of a severance motion, the charge with respect to wire fraud, and the district court's decision not to sequester the jury. The district court ruled that the motion was untimely, notwithstanding counsel for the Gregorys' assertion that the court

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[1]The Gregorys were convicted on one count of conspiracy and eight counts of misapplication of bank funds. The court of appeals affirmed in part but remanded for a further hearing on the issue of whether the proceedings with respect to them were tainted by use of their immunized testimony (Pet. App. 4a-8a). The Gregorys' certiorari petition, which raises issues unrelated to the instant petition, is pending before the Court in No. 84-520. Another co-defendant, G.W. Atkinson, was convicted on one count of conspiracy and six substantive counts. His convictions were affirmed on appeal (Pet. App. 2a).

[2]See Fed. R. Crim. P. 29(c), 33. Rule 33 provides:

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. * * * A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

had orally extended until April 26 the time within which to file the motion on April 8.[3] Pet. App. 25a. The court of appeals accepted petitioner's contention that the motion was timely, but concluded that the district court would have abused its discretion had it granted the motion, making remand unnecessary (*id.* at 26a).

c. In seeking rehearing in the court of appeals, petitioner raised for the first time the allegation of jury misconduct that forms the basis for the instant petition. In an affidavit executed on April 27, 1982, after the new trial motion was filed, a juror, David Ellison, indicated that he and other jurors had read and discussed various newspaper accounts of the trial and that he had been influenced in his decision on the verdict by a conversation with his mother (Pet. App. 1d-3d). Ellison stated that he contacted the trial judge on April 25 to discuss the matter, and that the judge advised him to speak to defense counsel (*id.* at 1d). Petitioner's new trial motion did not raise this issue, nor has petitioner at any time brought the affidavit to the attention of the district court. The court of appeals denied the petition for rehearing (*id.* at 1c).

2. Petitioner contends (Pet. 4-8) that the court of appeals improperly failed to consider the juror's affidavit in refusing to grant him a new trial. The affidavit may arguably have constituted newly discovered evidence[4] on the basis of which petitioner could have moved in the district court for a new trial within two years of the judgment of conviction.[5]

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[3]The court had denied a written request for extension of time on April 15, 1982 (Pet. App. 25a).

[4]See *United States* v. *Jones*, 597 F.2d 485, 488 (5th Cir. 1979); *Richardson* v. *United States*, 360 F.2d 366, 368 (5th Cir. 1966).

[5]Indeed, the two-year period has been interpreted as commencing from the issuance of the mandate of affirmance when an appeal has been taken. See *United States* v. *Granza*, 427 F.2d 184, 185 n.3 (5th Cir. 1970) (per curiam); 3 C. Wright, *Federal Practice and Procedure: Criminal 2d* § 558, at 361 (1982).

Fed. R. Crim. P. 33. Had he done so, he might have been entitled to a hearing to determine whether the integrity of the verdict had been compromised. See *Remmer* v. *United States*, 347 U.S. 227 (1954). But petitioner did not do so.[6] Nor did he raise the issue in the court of appeals until his petition for rehearing.

Petitioner may not choose the court of appeals as the initial forum in which to litigate the factual issues raised by the Ellison affidavit. See, *e.g.*, *Government of the Virgin Islands* v. *Josiah*, 641 F.2d 1103, 1105 (3d Cir. 1981) ("[i]t is up to the district court in the first instance to determine whether * * * a [new trial] motion is actually based on newly discovered evidence and, if so, whether the evidence supports the motion"); *United States* v. *Beal*, 404 F.2d 58 (6th Cir. 1968) (per curiam), cert. denied, 393 U.S. 1084 (1969). The court of appeals was fully justified in refusing to reverse on the basis of the affidavit, especially where it was not part of the record and was presented for the first time in the petition for rehearing. See, *e.g.*, *United States* v. *Salinas*, 701 F.2d 41 (5th Cir. 1983); *United States* v. *Walker*, 601 F.2d 1051, 1054-1055 (9th Cir. 1979); *United States* v. *White*, 454 F.2d 435 (7th Cir. 1971), cert. denied, 406 U.S. 962 (1972). Petitioner cites no case suggesting that appellate consideration of material outside the record is required in these circumstances.

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[6]Petitioner could have filed the motion with the district court while his appeal was pending. See Fed. R. Crim. P. 33; *Government of the Virgin Islands* v. *Josiah*, 641 F.2d 1103, 1105 (3d Cir. 1981); 8A *Moore's Federal Practice* para. 33.03[2], at 33-22 (2d ed. 1984).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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